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In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, ET AL., APPELLANTS

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge district court (J. App. 9–81)[1] is not yet reported.

JURISDICTION

The order of the three-judge district court (J. App. 82–83) was entered on June 25, 1974. Notices of appeal to this Court (J. App. 387–390) were filed on July 22, 1974, and July 24, 1974.[2] The jurisdictional

[1] "J. App." refers to the Joint Appendix lodged in this Court.

[2] The opinion and order of the three-judge district court encompassed three separate civil actions (Nos. 74–189, 74–1107, and 74–1149) that had been consolidated for disposition on cross-motions for summary judgment, and we have filed separate notices of appeal with respect to each action. However, we are treating those actions as a single consolidated action for purposes of our jurisdictional statement and brief on the merits.

statement was filed on August 23, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1252 and 1253.[3]

QUESTIONS PRESENTED

1. Whether Section 304(f) of the Regional Rail Reorganization Act of 1973, which bars a railroad in reorganization from discontinuing service or abandoning any line without the consent of the United States Rail Association, effects a taking of appellees' property in the constitutional sense.

2. Whether the taking, if any, is one for which there is no provision for just compensation.

3. Whether the provision of Section 207(b) of the Act that requires the dismissal of certain reorganization proceedings is invalid as a geographically nonuniform law on the subject of bankruptcies.

4. Whether the district court properly enjoined the Association from certifying a final system plan for judicial review under Section 209(c) of the Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article I, Section 8, Clauses 3 and 4, in pertinent part provide:

> The Congress shall have power * * *
>
> * * * * *
>
> To regulate Commerce with foreign Nations and among the several States * * *;
>
> To establish * * * uniform Laws on the subject of Bankruptcies throughout the United States; * * *.

---

[3] In the interest of expeditious consideration of the merits of this case, we are lodging this brief in advance of the noting of probable jurisdiction.

The Fifth Amendment to the Constitution in pertinent part provides:

> * * * [N]or shall private property be taken for public use, without just compensation.

Sections 207(b), 209(e), 303(e), and 304(f) of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, 998, 1000, 1006–1007, and 1009, in pertinent part provide:[4]

> Section 207(b). Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. * * * Because of the strong public interest * * * in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding. * * *

[4] The Rail Act in its entirety is set forth at J. App. 393–431.

Section 209(e). Within 90 days of its effective date, the Association shall deliver a certified copy of the final system plan to the special court and shall certify to the special court—

(1) which rail properties of the respective railroads in reorganization in the region * * * are to be transferred to the Corporation, in accordance with the final system plan;

(2) which rail properties of the respective railroads in reorganization in the region * * * are to be conveyed to profitable railroads, in accordance with the final system plan;

(3) the amount, terms, and value of the securities of the Corporation (including any obligations of the Association) to be exchanged for those rail properties to be transferred to the Corporation pursuant to the final system plan * * *; and

(4) that the transfer of rail properties in exchange for securities of the Corporation (including any obligations of the Association) and other benefits is fair and equitable and in the public interest.

Section 303(c). (1) After the rail properties have been conveyed to the Corporation and profitable railroads operating in the region * * * the special court, giving due consideration to the findings contained in the final system plan, shall decide—

(A) whether the transfers or conveyances—

(i) of rail properties of each railroad in reorganization * * * to the Corporation in exchange for the securities and the other benefits accruing to such railroad as a result of such exchange, as provided in the final system plan of this Act, and

(ii) of rail properties of each railroad in reorganization * * * to a profitable railroad operating in the region, in accordance with the final system plan, are in the public interest and are fair and equitable to the estate of each railroad in reorganization in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under section 77 of the Bankruptcy Act (11 U.S.C. 205), or fair and equitable to a railroad that is not itself in reorganization but which is leased, operated, or controlled by a railroad in reorganization; and

(B) whether the transfers or conveyances are more fair and equitable than is required as a constitutional minimum.

(2) If the special court finds that the terms of one or more exchanges for securities and other benefits are not fair and equitable to an estate of a railroad in reorganization * * * which has transferred rail properties pursuant to the final system plan, it shall—

(A) enter a judgment reallocating the securities of the Corporation in a fair and equitable manner if it has not been fairly allocated among the railroads transferring rail properties to the Corporation; and

(B) if the lack of fairness and equity cannot be completely cured by a reallocation of the Corporation's securities, order the Corporation to provide for the transfer to the railroad of other securities of the Corporation or obligations of the Association as designated in the final system plan in such nature and amount as would make the exchange or exchanges fair and equitable; and

> (C) if the lack of fairness and equity cannot be completely cured by reallocation of the Corporation's securities or by providing for the transfer of other securities of the Corporation or obligations of the Association as designated in the final system plan, enter a judgment against the Corporation.
>
> Section 304(f). After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local regional transportation authority reasonably opposes such action * * *.

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. * * *

STATEMENT

By 1973, the rail transportation network of the northeastern section of the United States was in grave danger of imminent financial collapse. See generally H. Rep. No. 93–620, 93d Cong., 1st Sess., pp. 25–29. Seven major railroads[5] operating principally in sev-

[5] The seven railroads are the Penn Central, Reading, Erie Lackawanna, Central of New Jersey, Lehigh Valley, Boston & Maine, and Ann Arbor. In addition, a smaller railroad, the Lehigh & Hudson River, had also entered reorganization.

enteen northern and eastern States[6] were attempting to reorganize under Section 77 of the Bankruptcy Act, 11 U.S.C. 205, and those proceedings were proving unsuccessful due to the apparently insoluble financial difficulties the railroads faced. See, *e.g.*, *In the Matter of Penn Central Transportation Co.*, 355 F. Supp. 1343 (E.D. Pa.). There was therefore a serious possibility that the rail service provided by some or all of the railroads would be terminated in order to liquidate the bankrupt estates and satisfy their obligations to creditors.

Congress recognized that the threatened wholesale termination of rail service would do incalculable damage to the nation's economy. See H. Rep. No. 93–620, *supra*, at 28–29. Accordingly, Congress enacted the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985, as a comprehensive solution to the impending rail crisis. This case involves the constitutionality of significant portions of that Act.

1. The major features of the Rail Act may be briefly summarized. The Rail Act establishes a public, nonprofit corporation, the United States Railway Association, and directs the Association to formulate a "final system plan" for the "establishment and maintenance of a [financially self-sustaining] rail service system adequate to meet the rail transportation needs and service requirements of the [northeast] region."

[6] The railroads operate principally in Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, West Virginia, Ohio, Indiana, Michigan, Illinois, and the District of Columbia.

Section 206(a) of the Rail Act. See, also, Sections 202 and 204. It is anticipated that the final system plan will provide for the sale of some of the rail properties of the railroads presently in reorganization to profitable railroads, to the National Railroad Passenger Corporation, and to state and local transportation authorities. Section 206(c) and (d). But the Rail Act contemplates that the centerpiece of the final system plan will be a newly organized for-profit corporation, the Consolidated Rail Corporation, to which the Association will issue up to one billion dollars of the Association's federally-guaranteed obligations. Sections 210, 301, and 302.

The final system plan is expected to provide for the transfer of the bulk of the rail properties of the railroads in reorganization to the Corporation in exchange for stock and securities of the Corporation and up to $500 million of the Association's obligations held by the Corporation.[7] Sections 206(d) and 210(b). The Corporation will be required to use at least $500 million of the Association's obligations for rehabilitation and modernization of the transferred rail properties. Section 210(b).

The final system plan is to be submitted to Congress within 450 days after the date of enactment of the Rail Act (January 2, 1974) and will become effective at the end of 60 session days if not disapproved by either house. Sections 207 and 208. Within 90 days thereafter, the plan is to be certified to a special three-

[7] Subject to congressional approval, the plan may also provide for additional consideration to the transferor railroads' estates in the form of federally guaranteed obligations of the Corporation. Section 206(i). See, also, Sections 206(h) and 210(b).

judge court appointed by the judicial panel on multidistrict litigation. Section 209. The special court is to order the transfer of rail properties from the estates of the railroads in reorganization to the Corporation and other transferees designated in the plan and thereafter to determine the fairness and equity of the consideration payable under the plan to the estates of those railroads. See generally Section 303.

If the special court determines that the consideration payable under the plan exceeds the constitutional minimum standard of fairness and equity, it must order the return of any excess. Section 303(e)(3). If instead the court finds that the terms of the exchange are unfair or inequitable to the estate of any railroad, it must reallocate the total consideration in a fair and equitable manner, and, if necessary, order the Corporation to transfer to that estate additional securities or obligations designated for that purpose in the final system plan, and, if further necessary, enter a judgment in the estate's favor against the Corporation for the additional amount needed to render the exchange fair and equitable. Section 303(e)(2). The judgment of the special court is reviewable by this Court. Section 303(d).

In order to ensure that rail service throughout the northeastern States remain adequate pending the transfer of properties to the Corporation under the final system plan, the Act forbids the railroads in reorganization from discontinuing service or abandoning lines without the consent of the Association. Section 304(f). However, the Secretary of Transportation is authorized to provide emergency assist-

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ance to the railroads pending implementation of the final system plan and to pay rail service continuation subsidies. Sections 213 and 402. The Secretary is further authorized "to enter into agreements with railroads in reorganization * * * for the acquisition, maintenance, or improvement of railroad facilities and equipment necessary to improve property that will be in the final system plan." Section 215.

The rail properties of a railroad in reorganization are subject to transfer under the final system plan only if the court having jurisdiction over its reorganization so orders within 180 days after the date of enactment of the Rail Act. However, Section 207(b) of the Rail Act provides that "[b]ecause of the strong public interest in the continuance of rail transportation in the [northeast] region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time * * * and that the public interest would be better served by such a reorganization * * *, [*] or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceeding."[8]

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[8] Two courts have now determined that the railroads under their jurisdiction are reorganizable on an income basis within a reasonable time. *In the Matter of Erie Lackawanna Railway Co.*, N.D. Ohio, No. B72-2838, Order No. 234, decided May 2, 1974; *In the Matter of the Boston & Maine Corp.*, D. Mass., No. 70-250M, memorandum opinion, decided May 2, 1974.

[9] Three courts have now found that the Act does not provide a process that is fair and equitable to the estates of the railroads under their jurisdiction. *In the Matter of Penn Central*

2. The present action was brought by the sole shareholder and major creditors of Penn Central Transportation Company, one of the railroads in reorganization, seeking declaratory and injunctive relief against enforcement of the Act. See J.S. 9–10, n. 9. They contended, *inter alia*, that the contemplated transfer of rail properties in exchange for stock and securities of the Corporation would effect a taking of their property for public use without just compensation; that enforcement of Section 304(f), which bars railroads from discontinuing service or abandoning lines prior to the transfer without the consent of the Association, also would effect such a taking; and that the entire Act exceeds the power of Congress under the bankruptcy clause of the Constitution.

Transportation Co., E.D. Pa., Bky. No. 70–347, Order No. 1596, decided July 1, 1974; *In the Matter of Lehigh Valley Railroad Co.*, E.D. Pa., Bky. No. 70–432, Order No. 252, decided July 1, 1974; *In the Matter of Penn Central Transportation Co. (Secondary Debtors)*, E.D. Pa., Bky. Nos. 70–347A to 70–347O, multiple orders all decided July 1, 1974; *In the Matter of Central Railroad Company of New Jersey*, D. N.J., Bky. No. 401–67, decided June 28, 1974; *In the Matter of Lehigh and Hudson River Railway Co.*, S.D. N.Y., Bky. No. 72–419, decided July 1, 1974. Two other courts have refused to find that the process under the Act is not fair and equitable. *In the Matter of the Reading Co.*, E.D. Pa., Bky. No. 71–828, Order No. 650, decided July 1, 1974; *In the Matter of the Ann Arbor R. Co.*, E.D. Mich., No. 74–90833, decided July 1, 1974. These cases are all currently on appeal to the special three-judge court established under Section 209(b). The decision of that court on the question of the fairness and equity of the process is made nonreviewable by Section 207(b), which also requires the court to decide the appeals within 90 days (i.e., by September 29, 1974); however, the government has urged the special court to stay its mandate pending disposition of the instant case.

The three-judge court determined first that the question whether the final transfer of rail properties to the Corporation would effect an unconstitutional taking of appellees' property was not yet ripe for adjudication (J. App. 23–25). The court concluded, however, that the problem of "interim erosion" of the bankrupt estates posed by losses resulting from involuntary continuation of service or lines was ripe for adjudication, and the court enjoined the defendants from acting under Section 304(f) to prohibit any "reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary [to prevent a taking]" (J. App. 82).[10] The court based that ruling upon a determination that the Act impliedly amends the Tucker Act so as to bar suits for damages for any takings resulting from the continued operation of the railroads (J. App. 40–53).

The court further determined that although the Act in principal part is within the general commerce power of Congress, the provision of Section 207(b) that requires dismissal of certain reorganization proceedings is invalid as a geographically non-uniform law on the subject of bankruptcies (J. App. 61–65); enforcement of that provision was therefore enjoined. The court then proceeded, without any

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[10] The court did not determine whether in fact any such taking had yet occurred. It indicated, however, that a determination of that kind would require consideration of "both * * * the amount of erosion of the Debtor's estate which can be permitted to occur before impairing liquidation value, and * * * the length of time that is reasonable for assessing the ultimate prospects of achieving sufficient profitability to support a valid recapitalization of the enterprise" (J. App. 41, n. 23).

further statement of reasons, to enjoin the Association from certifying a final system plan for judicial review under Section 209(c) (J. App. 53).

SUMMARY OF ARGUMENT

I

As a matter of law, there will be no interim erosion amounting to a taking under the Rail Act. This Court has long recognized that the rights of claimants against the estate of a bankrupt railroad are limited by and subject to a countervailing public interest in continued rail service. See *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648. Thus substantial erosion of the amount available to satisfy prebankruptcy claimants has been permitted to occur during reorganization proceedings, on the ground that by investing "in a public utility that * * * owe[s] an obligation to the public * * * [such claimants] assumed the risk that in any * * * reorganization the interests of the public would be considered as well as theirs." *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.*, 328 U.S. 495, 535–536. Accordingly, it has become well established that the owners and creditors of a railroad may constitutionally be compelled to bear the burden of continuing its operations in the public interest for a reasonable time pending substantial good faith efforts to restore it to financial viability. See, *e.g.*, *New Haven Inclusion Cases*, 399 U.S. 392, 489–495; *Penn-Central Merger Cases*, 389 U.S. 486, 507–511; *In re Boston and Maine Corp.*, 484 F. 2d 369, 374–375 (C.A. 1).

In this case, appellees may be compelled to bear the burden of continuing the operations of the Penn Cen-

tral pending implementation of the final system plan. The public interest in continued operations is substantial. The "interim" during which erosion in the amount available to satisfy prebankruptcy claimants could occur is expected to be extremely brief by reorganization standards, and the record does not show that substantial erosion has or will occur. Moreover, the Rail Act represents a substantial good faith effort to restore the northeastern rail system to financial viability. The Rail Act provides financial assistance that will serve both to soften the impact of any interim erosion and enhance the probability of successful reorganization, and it enables the creation of a financially self-sustaining core system by permitting the expeditious weeding out of uneconomic lines.

II

But assuming *arguendo* that any interim erosion under the Rail Act could amount to a taking, there is ample provision for just compensation. The special court may award such compensation under Section 303. Just compensation for any otherwise uncompensated taking is available under the Tucker Act in the Court of Claims.

Congress may not be held to have withdrawn the jurisdiction conferred on the Court of Claims by the Tucker Act without compelling evidence of an explicit intention to do so. See, *e.g.*, *Amell* v. *United States*, 384 U.S. 158; *Hurley* v. *Kincaid*, 285 U.S. 95. There is no such compelling evidence here. Although the Rail Act expressly makes several other prior statutes inapplicable, it contains no reference at all to the

Tucker Act; and the statutory scheme does not require denial of Court of Claims jurisdiction. Furthermore, the legislative history fails to show a congressional understanding that the traditional Court of Claims remedy would be unavailable. Accordingly, the court below should not have enjoined interim takings under Section 304(f).

III

The dismissal provision of Section 207(b) of the Rail Act is not invalid as a geographically nonuniform law on the subject of bankruptcies. That provision does not, by its terms, discriminate geographically; this Court would be required to read nonuniformity into that provision in order to strike it down. Moreover, no railroad reorganization proceeding has been or ever will be either included or excluded from the reach of the dismissal provision merely on the basis of geography. Although the only such proceedings pending during the application of Section 207(b) were located in the northeastern States, that fact does not invalidate the statute. See, *e.g.*, *Head Money Cases*, 112 U.S. 580. Furthermore, Section 207(b) applies equally to all creditors no matter where they are located, and that is all the bankruptcy clause requires. See *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 172 (concurring opinion of Justice Frankfurter). The court below therefore erred in enjoining enforcement of the dismissal provision.

IV

The court erred in enjoining certification of the final system plan even assuming *arguendo* that Sec-

tions 304(f) and 207(b) are constitutionally defective. Any constitutional defects in Sections 304(f) and 207(b) would not affect the validity of the certification process. Moreover, the district court dealt with the alleged constitutional defects by enjoining enforcement of Section 304(f) and the dismissal provision of Section 207(b); it was improper for the court additionally to enjoin certification of the plan.

ARGUMENT

I

SECTION 304(f) OF THE RAIL ACT DOES NOT EFFECT A TAKING OF APPELLEES' PROPERTY

Section 304(f) does not by its terms bar railroads in reorganization from discontinuing service or abandoning lines. The effect of the provision is rather to make the consent of the Association a condition of such discontinuance or abandonment. In this respect, Section 304(f) is analogous to Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), which forbids a railroad from terminating service without permission from the Interstate Commerce Commission.

The district court did not declare Section 304(f) invalid on its face. The court recognized that Section 304(f), like Section 1(18) of the Interstate Commerce Act, at least within limits serves a legitimate and necessary regulatory purpose. Nor did the court find that Section 304(f) had yet been applied in such a manner as to effect a taking, in the constitutional sense, of appellees' property. Any such finding would of course have been premature; there is nothing in

the record to indicate that any of the railroads in reorganization has yet requested the Association's consent to a discontinuance of service or abandonment of lines on the ground that involuntary continued loss operations would constitute a taking. Moreover, the court apparently recognized that involuntary continued loss operations would not amount to a taking *per se* (see J. App. 41, n. 23).

The district court nevertheless enjoined the defendants from prohibiting any "reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary [to prevent a taking]" (J. App. 82). In making that determination, the court apparently assumed that claimants against a railroad in reorganization are constitutionally entitled to the liquidation value of the estate as of the date of bankruptcy (J. App. 41, n. 23); the court apparently concluded that continued involuntary loss operations threatened to impair the liquidation value of the estate or to result in such accumulated administrative claims as to reduce the amount available to satisfy prebankruptcy claimants (J. App. 36–40).

The court erred fundamentally in its analysis of the taking issue. The question whether involuntary continued loss operations result in a taking cannot be answered by reference to any bright-line test. The determination whether a taking has occurred in the course of a railroad reorganization requires a complex balancing of the competing public and private interests. Application of that balancing test to this case shows that any involuntary continued loss oper-

ations under the Rail Act will not be such as to amount to a Fifth Amendment taking. There was, therefore, no basis for enjoining the Association from exercising in full the discretion granted to it, by Section 304(f) of the Rail Act, to protect the public interest by prohibiting discontinuance of needed rail service.

A. CLAIMANTS AGAINST A BANKRUPT RAILROAD MAY CONSTITUTIONALLY BE COMPELLED TO BEAR THE BURDEN OF CONTINUING ITS OPERATIONS FOR A REASONABLE TIME PENDING SUBSTANTIAL GOOD FAITH EFFORTS TO RESTORE IT TO FINANCIAL VIABILITY

It has long been understood that there is no talismanic guide for applying the Fifth Amendment's taking clause. As Justice Holmes once observed, "the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; * * * some play must be allowed to the joints if the machine is to work." *Tyson & Brother* v. *Banton*, 273 U.S. 418, 445–446 (dissenting opinion). The careful weighing of social needs against private interests has played a significant and legitimate role in decisions under the taking clause: "it is not an overstatement to say that perhaps the principal concern of the courts in the law of eminent domain is to draw the line equitably between compensable and non-compensable governmental interferences with property owners, and the process of arriving at a decision that is fair both to the public and to private interests involves a careful weighing and balancing of these interests." Kratovil and Harrison, *Eminent Domain—Policy and Concept*, 42 Calif. L. Rev. 596, 626 (1954).

This balancing process, applied in a long line of decisions in this and other courts, has established that the rights of claimants against a bankrupt railroad are inherently limited by and subject to the countervailing public interest in continued rail service, to the extent that such claimants may constitutionally be compelled to bear the burden of continuing the railroad's operations for a reasonable time pending substantial good faith efforts to restore the railroad to financial viability.[11] Although courts, in striking the final balance, may consider the possibility that a continuation of loss operations may result in net reduc-

[11] This proposition is not inconsistent with *Brooks-Scanlon Co.* v. *R.R. Comm.*, 251 U.S. 396, *Bullock* v. *R.R. Comm. of Florida*, 254 U.S. 513, and *Railroad Comm.* v. *Eastern Tex. R.R.*, 264 U.S. 79, upon which appellees relied in the court below. Those cases held that small logging railroads cannot be compelled to operate indefinitely in the absence of any "reasonable prospect of profitable operation in the future." *Bullock* v. *R.R. Comm. of Florida*, *supra*, 254 U.S. at 520–521. Those cases were all decided before any method of statutory reorganization had been made available; the assumption in each was that further operations could not be made profitable. Those cases therefore cannot govern a situation where substantial efforts are being made pursuant to statute to restore the railroad to profitability; they do not give the owners or creditors of a railroad an unqualified right to liquidate a railroad for which there is a nonnegligible chance of being restored to financially self-sustaining operations. Moreover, the public interest in a continuation of the rail service provided by those railroads was insubstantial if not nonexistent; in at least two of the cases the timber-cutting operations in the area served by the railroad had been terminated. There was no contention that the public interest required continued service pending reorganization; no occasion arose for balancing the public interest in saving the railroads against the burdens imposed in the interim on their owners.

tion in the amount available to satisfy prebankruptcy claimants, this Court has never held that factor to be constitutionally determinative.

In *Continental Bank* v. *Rock Island Ry.*, 294 U.S. 648, this Court upheld an order of a reorganization court barring holders of the debtor railroad's collateral notes from foreclosing on their collateral. The collateral notes were secured by mortgage bonds, and foreclosure entailed only a sale of the bonds to the public, yet the Court barred even this relatively minor interference with the reorganization process. 294 U.S. at 678–679. Although the face amount of the bonds exceeded that of the notes, there was no assurance that the noteholders would be satisfied in full. The Court, apparently recognizing that the reorganization court's order might prevent the noteholders from achieving full satisfaction, conceded that "[i]t may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained." 294 U.S. at 676. But, as the Court had already noted, different considerations apply to railroad reorganization proceedings since a railroad's "activities cannot be halted because its continuous, uninterrupted operation is necessary in the public interest * * *." 294 U.S. at 671. The Court therefore concluded that in the circumstances the creditors' interest in preserving their capital investment intact had no constitutional significance. 294 U.S. at 676–677. The Court was prepared to qualify that conclusion only in the event that the delay prior to formulation and implementation of a plan of reorganization proved to be unreasonable (294 U.S. at 685):

> It is true that no plan has yet been consummated; and, so far as the record shows, none has been prepared or is in the course of preparation. If this long delay were without adequate excuse, the retention of the injunction for the long period which has intervened since it was granted could not be justified. But the delay is obviously due to the many doubts and uncertainties arising from the present litigation. * * * With those doubts and uncertainties now removed, the proceeding should go forward to completion without further delay * * *.

Similar considerations led the Court in *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.*, 328 U.S. 495, 535–536, to uphold as fair and equitable a plan of reorganization that sanctioned the loss by junior creditors of 90 percent of their investment during the reorganization proceedings:

> * * * [T]hey invested their capital in a public utility that does owe an obligation to the public. * * * [B]y their entry into a railroad enterprise, [they] assumed the risk that in any * * * reorganization the interests of the public would be considered as well as theirs.

But the scope of the Fifth Amendment taking clause in railroad reorganization has been most clearly delineated in a series of decisions involving the New York, New Haven, and Hartford Railroad. Those decisions unequivocally establish that railroad creditors may for a reasonable time be forced to bear substantial and uncompensated losses, resulting if necessary in a substantial reduction in the amount available to satisfy prebankruptcy claimants, pending reorganiza-

tion. Because of the importance of those decisions and their direct relevance to the facts of this case, we review them here in some detail.

The New Haven entered reorganization on July 7, 1961. It continued to suffer substantial cash outflows and operating losses, and by late 1963 "it became apparent that the inclusion of the New Haven in the Penn-Central merger was the only salvation for the New Haven as an operating railroad, and at that time it was thought to be the solution which best served the interests of the creditors as well as the public interest." *In re New York, New Haven and Hartford Railroad Co.*, 289 F. Supp. 451, 456 (D. Conn.). Accordingly, the New Haven's trustees and the two larger railroads, with the blessing of the reorganization court and the encouragement of the Interstate Commerce Commission, ultimately agreed that the New Haven's assets would be included in the Penn-Central merger. However, "because the merger and the reorganization proceedings stretched out far beyond what was originally forecast, the 'interim' became seven and a half years; and 'losses reasonably incident to working out the solution most consistent with the public interest' eroded the debtor's estate in excess of $60 million." *In re New York, New Haven and Hartford Railroad Co.*, 304 F. Supp. 793, 800 (D. Conn.). Since the estate had no going concern value (*In re New York, New Haven and Hartford Railroad Co., supra*, 289 F. Supp. at 455), this erosion directly reduced the amount that could be made available through liquidation for the satisfaction of prebankruptcy claims.

Faced with the prospect of still further erosion resulting from involuntary continued loss operations, and fearing that losses incurred after the Penn-Central merger but prior to inclusion of the New Haven's assets would be borne by the New Haven estate and its creditors rather than by the newly merged railroad, a group of New Haven creditors sought to bar the merger until simultaneous inclusion could be achieved. This Court, apparently recognizing that a postponement of the merger would virtually necessitate a liquidation of the New Haven, and that it was that end which the creditors in fact sought, rejected their demand (*Penn-Central Merger Cases*, 389 U.S. 486, 510–511):

> Continuation of the operations of the NH, which the Commission has found to be essential, can be assured only upon and after effectuation of the merger of the Penn-Central. The bondholders agree that to delay the Penn-Central merger until all proceedings necessary to include the NH have taken place may well mean the end of NH operations. The only realistic way to avoid this is to permit prompt consummation of the Penn-Central merger subject to appropriate conditions respecting the New Haven which Penn-Central will perforce accept by its act of merger. While the rights of the bondholders are entitled to respect, they do not command Procrustean measures. They certainly do not dictate that rail operations vital to the Nation be jettisoned despite the availability of a feasible alternative. The public interest is not merely a pawn to be sacrificed

for the strategic purposes or protection o
class of security holders whose interests may
may not be served by the destructive move

The New Haven creditors thereupon petitioned
reorganization court to dismiss the proceedings
order the New Haven's liquidation, on the ground t
the continuing erosion constituted a taking of th
property under the Fifth Amendment. The predi
ment of the New Haven creditors at that time was
more compelling than that of the appellees here. T
New Haven had been in reorganization for sev
years, suffering continuous losses. The equity and
secured debt had become worthless. See *New Ha*
Inclusion Cases, 399 U.S. 392, 490, n. 82. For m
than four years, it had been clear that the railro
could not be made viable without external assistan
The only solution, inclusion in the Penn Central, w
still some time away and was outside the control
the reorganization court. Although the exact amou
of consideration to be paid for the New Haven
assets had not been calculated, the upper limit h
been fixed by the Interstate Commerce Commissi
at liquidation value as of December 31, 1966. Sin
that date, additional administrative claims had a
cumulated, thereby reducing the eventual recove
available to secured creditors.

The reorganization court nevertheless rejected t
petition to dismiss, declaring that "[t]o jettison ever
thing achieved and turn back just as a glimmer
light begins to show at the end of a long dark tunn
not only carries with it an aura of unreality bu

borders on the fantastic." *In re New York, New Haven and Hartford Railroad Co.*, 281 F. Supp. 65, 68 (D. Conn.).

In the meantime, the Commission had approved a proposed purchase agreement for the New Haven assets. The New Haven creditors attacked the agreement for, *inter alia*, failing to require the Penn Central to compensate the estate for all operating losses that it had incurred subsequent to the Penn-Central merger, on the theory that they were at least entitled to compensation for post-1966 erosion in their interests. The three-judge reviewing court also rejected the creditors' claims (*N.Y., N.H. & H. R. Co. Bondholders' Committee* v. *United States*, 289 F. Supp. 418, 444 (S.D. N.Y.)):

> Although we agree that by investing in a railroad the bondholders did not surrender their constitutional right not to be required to operate the property at a perpetual loss, they did subject themselves to such losses as are reasonably incident to working out the solution most consistent with the public interest.

Later in 1968 the reorganization court determined it would not permit further priority borrowing to sustain rail operations beyond the end of the year and that it would entertain a motion to dismiss the proceedings unless the sale of the assets to the Penn Central was consummated before then, on the ground "that the continued erosion of the Debtor's estate from operational losses after the end of 1968 will clearly constitute a taking of the Debtor's property and consequently the interests of the bondholders,

without just compensation." *In re New York, New Haven and Hartford Railroad Co., supra.*, 289 F. Supp. at 459. But this determination did not rest upon a simple equation of "taking" with either post-bankruptcy or post-1967 erosion of the prebankruptcy claimants' interests. The court recognized that those interests had in fact been "chiseled down day after day by * * * operating losses." 289 F. Supp. at 457. The court ruled that the determination of when a taking occurs during a railroad reorganization requires a balancing of the interests of prebankruptcy claimants against the public interest in continued rail service; it struck that balance in favor of the creditors only when there was no longer a substantial public interest in further delay (289 F. Supp. at 455, 459, 460):

> * * * [A]s bondholders of a railroad [the creditors'] interests are subject to such invasion as may be essential to continue the operation of the railroad for a reasonable period of time to provide an opportunity to work out a permanent plan or means of continuing the operations, if possible, to the extent that it is required by the public interest.
>
> * * * * *
>
> The extent to which the * * * [creditors'] property rights * * * may properly be invaded in the public interest to keep railroad operations going pending a solution of the problem of reorganization, is hardly a matter which can be determined with mathematical precision. It involves a consideration of the amount and nature of the Railroad's obligations, the seriousness of adverse consequences to the public

> if service were terminated, the rate of losses and the feasibility of possible solutions. * * *
>
> * * * * *
>
> There is presently no reason why the Penn-Central should not take over the New Haven at the beginning of 1969.

The sale of the New Haven's assets to the Penn Central was thereafter consummated at a price equal to their liquidation value as of December 31, 1966. This was not, of course, the measure of the secured creditors' recovery. Their claims were subordinate to the more than $60 million in administrative claims that had accumulated as a result of deficit operations during reorganization both before and after December 31, 1966. The secured creditors, therefore, took the position that under the Fifth Amendment they were at least entitled to net liquidation value as of that date, unreduced by later-arising administrative claims.

This Court considered and rejected that contention in the *New Haven Inclusion Cases, supra.* The Court acknowledged that the secured creditors had suffered substantial erosion of their security as a result of continued loss operations but concluded that there was "no constitutional bar to that result" (399 U.S. at 491), in view of the substantial public interest that had been served by maintenance of the New Haven's rail services and the fact that the creditors had knowingly invested in a regulated utility that owed an obligation to the public.[12] See, also, *In re Boston and Maine Corp.*, 484 F. 2d 369, 374–375 (C.A. 1).

[12] The Court also noted (399 U.S. at 492–493) that the record did not establish the extent of post-1966 losses and that the secured creditors first petitioned for dismissal and liquidation

The court below thus erred in its apparent assumption that a net reduction in the amount available to satisfy prebankruptcy claimants would of necessity constitute a Fifth Amendment taking. Before the court concluded that a taking was imminent or even possible under the Rail Act, it should have considered the public interest in continued nonpassenger rail service throughout the northeastern United States, the extremely brief period during which the burdens of continued loss operations, if any, would fall upon the railroad creditors, [redacted] the substantial federal assistance that is made available under the Rail Act, and the fact that the Rail Act permits a profitable restructuring of the entire northeast rail system. Consideration of those factors, as we now show, should have led the court to conclude that no reasonably foreseeable losses incurred pending implementation of the final system plan will constitute a taking under the Fifth Amendment.

B. THE RAIL ACT REPRESENTS A SUBSTANTIAL GOOD FAITH EFFORT TO RESTORE THE NORTHEAST RAIL SYSTEM TO FINANCIAL VIABILITY

1. The public interest in continued rail service in the northeastern States requires little elaboration.[12]

in April 1967. Those considerations obviously were not the basis of the Court's decision, however, for if the constitutional claim advanced by the secured creditors had been meritorious they would have been entitled at least to recovery of a portion of the post-April 1967 losses, and the extent of those losses could have been determined on remand.

[12] The area served by the Penn Central encompasses 55 percent of the nation's manufacturing plants; that railroad alone carries 21 percent of all United States freight car loadings and serves 59 defense facilities. Department of Transportation, *The Penn Central and Other Railroads*, Report to the Senate Committee on Commerce, p. xix (1972). Moreover, termination of Penn Central operations would cause an immediate drop in

In passing the Rail Act, Congress was motivated by an awareness of the severity of the adverse impact which liquidation of the railroads now in reorganization would have upon the economy and security of the entire nation (H. Rep. No. 93–620, *supra*, at 28):

> * * * [T]he public interest would not be served if these bankrupt carriers were shut down and sold on the "auction block". The services these carriers perform are essential to the nation, and the blow to the economy if such services were interrupted only briefly, would be devastating. This is a matter which affects not only the economy, but also the defense needs of the nation. The future of rail transportation in the Northeast transcends the interests of not only the investors, the creditors, the managers and trustees, and the people and the industries of the Northeast region—it is an American problem, one affecting all of us.

This congressional evaluation of the public interest is of course entitled to substantial deference. See, *e.g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 609–610 (concurring opinion of Justice Frankfurter); *United States* v. *Darby*, 312 U.S. 100, 115–117; *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, 400.

2. But in moving to protect this public interest, Congress did not place upon the creditors the burden of lengthy and indefinitely continued loss operations. Congress instead established an expedited procedure

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GNP of 2.7 percent and increase unemployment by over two million. Statement of Secretary Brinegar, Hearings before the Surface Transportation Subcommittee of the Senate Committee on Commerce, on S. 1031, Northeastern Railroad Transportation Crisis, 93d Cong., 1st Sess., pt. 2, p. 258.

for reorganizing the railroads into a financially self-sustaining system in less than two years after the date of enactment (and thus within approximately 13 months after the date of this filing). The "interim" during which further erosion in the bankrupt estates may occur pending reorganization is thereby extremely brief by reorganization standards. This is not too long a period to make creditors wait for a reorganization vitally necessary in the public interest; it may in fact be a shorter period than would be required for completion of the complex and time-consuming process of liquidation.

In view of the brevity of the interim period prior to reorganization under the Rail Act, any erosion in the bankrupt estates resulting from further loss operations pending implementation of the final system plan will be comparatively slight. Indeed, the record in this case fails to establish that proceedings under the Rail Act will impose any economic loss on appellees. We review that record at length in the Appendix, *infra*.

In brief summary, the losses reported on Penn Central's income statements do not reflect actual erosion in the value of the estate (see App., *infra*, pp. 63–65). The value of the estate appears to have increased since the date of the reorganization petition, although it cannot be determined from the record whether this increase fully offsets accumulated administrative claims (see App., *infra*, pp. 67–70). The current liquidation value of the estate apparently exceeds the valid claims against it by a minimum of $1.3 billion, an amount adequate to cushion creditors

against even indefinitely continued losses (see App., *infra*, pp. 70–72). Furthermore, it is quite possible that the estate would at this point suffer greater erosion from liquidation than from continued operations pending implementation of the final system plan (App., *infra*, p. 73).

3. Moreover, the Rail Act provides substantial financial assistance that will serve both to soften the impact on claimants of any interim erosion in the estates of the debtor railroads and to enhance the probability of successful reorganization of those railroads into an economically viable, financially self-sustaining rail system. The Association is authorized under Section 210 of the Rail Act to issue up to $1.5 billion in federally guaranteed obligations.[14] Of this amount, up to $1 billion may be issued to the Corporation, which will use at least $500 million of that amount for rehabilitation and modernization of the rail properties transferred to it from the debtor railroads. Section 210(b).

Because Section 211(e) permits loans on such "terms and conditions * * * as the Association deems appropriate," the Association's loans to the Corporation may be made on terms considerably more favorable than would ordinarily be available commercially. Thus the Corporation could have available to it at the outset up to $1 billion in "soft financing." In addition, Section 213 authorizes the Secretary of Trans-

[14] The $1.5 billion figure is a revolving limitation; additional obligations may be issued as repayments are made. Section 210(b). Congress may by joint resolution approve the issuance of further obligations above the $1.5 billion ceiling. *Ibid.* See, also, Section 206(h) and (i).

portation to make payments not exceeding $85 million to the trustees of the debtor railroads to assist them in meeting emergency needs pending implementation of the final system plan. Congress has already appropriated $74.8 million for that purpose. See Title VII of the Foreign Assistance and Related Programs Appropriation Act of 1974, Pub. L. 93–240, 87 Stat. 1057; Chapter XI of the Second Supplemental Appropriations Act of 1974, Pub. L. 93–305, 88 Stat. 210. Section 402 of the Rail Act further provides for an additional $180 million in rail continuation subsidies. And Section 215 authorizes the Association to issue up to $150 million in obligations for acquisition, maintenance or improvement of railroad facilities and equipment pending implementation of the final system plan.

4. The financial resources provided by the Rail Act might alone enable the northeastern rail transportation system to escape from the vicious circle in which it is now trapped—a circle in which insufficient revenues lead to deterioration of the physical plant, deteriorating plant to inadequate service, and worsening service to a further reduction in revenues. See Penn Central Trustees' January 1973 Report, p. 2. But the Rail Act does far more than just provide desperately needed financial assistance: it provides a means of systemic restructuring unavailable under prior law.

The objective of the Rail Act is the fashioning of a financially sound rail system out of individually unreorganizable bankrupt railroads. Congress realized that that objective could not be achieved without an

expeditious means for eliminating duplicative and unneeded facilities. The Penn Central Trustees,[15] the Department of Transportation,[16] the Penn Central reorganization court,[17] and Congress [18] have all recognized that each of the northeastern railroads, and the Penn Central in particular,[19] is burdened by excessive physical plant. Much of this excessive plant represents "plant redundance"—the operation of duplicative facilities by two railroads in an area capable of supporting only one. See Department of Transportation, *Rail Service in the Midwest and Northeast Region* 3 (February 1, 1974) (finding that 96% of the 1972 freight carloads carried by the debtor railroads could have been accommodated on 76% of their 1972 trackage). Proceedings under Section 77 of the Bankruptcy Act cannot solve these problems; reorganization courts conducting such proceedings lack the authority to deal with excess capacity even of the particular railroad in reorganization, let alone that of the system as a whole. See H. Rep. No. 93–620, *supra,* at 25–29; *In re Penn Central Transportation Company,* Bky, No. 70–347, Mem. and Order No. 1543, p. 5 (E.D. Pa., May 2, 1974).

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[15] See Penn Central Trustees' February 1972 Report, p. 2; see also their Reports for January 1973 and April 1974.

[16] See p. 6 of the Department's study on the *Northeastern Railroad Problem, A Report to Congress* (submitted March 26, 1973).

[17] *In re Penn Central Transportation Company*, Bky. No. 347, Mem. and Order No. 1543, p. 5 (E.D. Pa., May 2, 1974).

[18] H. Rep. No. 93–620, *supra*, at 29.

[19] By January 1, 1973, the Penn Central Trustees had filed applications with the Commission for the abandonment of over 3,000 miles of lines. Penn Central Trustees' January 1973 Report, p. 3.

Railroads undergoing reorganization under the Bankruptcy Act must apply to the Commission for authority to abandon uneconomic lines (see Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1), and the Commission in turn is required to comply with time-consuming National Environmental Policy Act procedures. *Harlem Valley Transportation Ass'n.* v. *Stafford,* 360 F. Supp. 1057 (S.D. N.Y.), affirmed, C.A. 2, No. 73–2496 (June 18, 1974). Although there is substantial disagreement as to the length of time normally required for the processing of an abandonment application by the Commission,[20] the Department of Transportation concluded (*Northeastern Railroad Problem, supra,* at 22):

> Lengthy procedures often prevent or unnecessarily hinder a railroad's efforts to abandon branch or other lines that can no longer cover even variable costs. Hearings, briefs, rebuttals,

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[20] Stephen Ailes, President of the Association of American Railroads, stated in House hearings that "[i]n cases in which protests are filed and hearings held, the average time from date of filing to date of final decision is anywhere from 15 to 18 months—despite the fact that only a few miles of track are usually involved." Hearings before the Subcommittee on Transportation and Aeronautics of House Committee on Interstate and Foreign Commerce, on H.R. 1416 and H.R. 11825, Transportation: Regulation of International Airfares, 92d Cong., 1st Sess., pt. 1, p. 357. George M. Stafford, Chairman of the Interstate Commerce Commission, replied that "the bottleneck in the elimination of redundant capacity is the lack of initiative on the part of railroad management" and that "[i]n the approximately 1,000 abandonment applications received within the past decade, we were able to dispose of more than 70 percent without oral hearing and of those approximately two-thirds were approved within 60 days' time." Id. at 261.

> and other procedures may delay abandonment for years—all the while forcing the railroad to provide the service at a loss.

The amount of delay encountered by an abandonment application will depend in part upon whether the application is contested. Contests are most likely where the application relates to lines carrying substantial traffic; yet the abandonment of just such lines may be necessary to restore the northeastern railroads to profitability. See Department of Tranportation, *Rail Service in the Midwest and Northeast Region, supra,* at 8–10.

In considering the Rail Act, Congress emphasized its concern over the economic burdens that lengthy abandonment procedures had imposed upon the railroads. See H. Rep. No. 93–620, *supra,* at 27, 53; see also 119 Cong. Rec. S22483 (daily ed., December 11, 1973) (Senator Hartke) and S23782 to S23783 (daily ed., December 21, 1973) (Senator Hartke). Accordingly, Congress made both the Interstate Commerce Act and the National Environmental Policy Act inapplicable to abandonments under the Rail Act. Section 601(b) and (c). Instead, during the interim period prior to implementation of the final system plan, the Association is granted authority, in the absence of a reasonable objection from affected state, local, or regional transportation authorities, to permit prompt discontinuance of service and abandonment of lines. Section 304(f). And, more significantly, the service lines not transferred to the Corporation under the final system plan may be promptly discontinued and abandoned by the railroads concerned, unless the

service is fully subsidized or the lines are purchased and operations provided for by the purchaser. Section 304(a), (b), (c), and (d). No application need be filed with either the Commission or the Association with respect to such discontinuances and abandonments.[21]

Thus, the Rail Act enables the creation of a financially self-sustaining core system by permitting the weeding out of uneconomic or otherwise undesirable lines and the selection of only those lines that will contribute positively to the economic viability of the system. This could not have been achieved under prior law. As indicated above, reorganization courts have no authority to restructure a debtor's rail operations, for they are dependent upon the Commission's authorization of piecemeal abandonments. See Section 77(o) of the Bankruptcy Act. Moreover, restructuring of an entire system is outside the jurisdiction of a reorganization court and also beyond its capacity, because of the difficulty of conducting negotiations between debtor railroads (H. Rep. No. 93–620, *supra*, at 29), the need for Commission approval of mergers and consolidations (Section 5 of the Interstate Commerce Act), and antitrust considerations. Even the Commission lacks authority to impose a system-wide plan

[21] The elimination of employees through discontinuance of service and abandonment of lines involves substantial employee protection payments under existing collective bargaining agreements. See, *e.g.*, Penn Central Trustees' Reports for January 1973 (p. 3) and October 1972 (pp. 3–4). The Rail Act removes this burden from the debtor railroads by providing independently for employee protection; federal funds of up to $250 million are committed under Section 509 to the payment of such employee protection benefits.

upon a reluctant debtor railroad. See *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 309, n. 12.

5. The Rail Act—by providing substantial federal assistance and permitting a profitable restructuring of the entire northeast rail system—constitutes a substantial good faith effort to restore the northeast rail system to financial viability. Accordingly, in view of the substantial public interest in continued rail service in the northeast, the extremely brief interim period required under the Rail Act before the final system plan is to be implemented, and the absence of any compelling showing of extreme hardship on the bankrupt estates, the investors in the debtor railroads may be constitutionally compelled to bear the burden of continuing operations pending implementation of the plan. The district court therefore erred in barring the Association from freely exercising its discretion under Section 304(f) to prevent discontinuance of needed rail services.

II

APPELLEES WILL RECEIVE JUST COMPENSATION FOR ANY TAKING

Though we believe there is no interim erosion occurring prior to the implementation of the Rail Act that amounts to a taking, in any event, full and adequate compensation may be available under Section 303 of that Act and will certainly be available in the Court of Claims under the Tucker Act.

A. COMPENSATION IS AVAILABLE UNDER SECTION 303 OF THE RAIL ACT

The estates of the debtor railroads will receive stock and securities of the Corporation, and obligations of the Association, in exchange for the rail properties transferred to the Corporation under the final system plan. See Section 303(b). The special court established under Section 209(b) will then review that exchange to determine whether its terms are "fair and equitable to the estate of each railroad in reorganization." Section 303(c)(1). Nothing in the Rail Act bars the special court from considering interim erosion amounting to a taking in making that determination. Thus the special court could provide compensation for any taking resulting from interim erosion by reallocating the consideration provided in the final system plan, awarding additional securities of the Corporation or obligations of the Association, and entering a judgment against the Corporation. See Section 303(c)(2).

Congress believed that the consideration to be provided under Section 303 would be constitutionally adequate (H. Rep. No. 93–620, *supra*, at 54–55):

> The Committee expects that the intrinsic value of the stock of the new Corporation will be found to be at least equal to the fair and equitable value of the rail properties conveyed in exchange. * * * The Committee is of the opinion that * * * the provision for deficiency judgment and payment of obligations of the Association * * * are more than adequate to guarantee that the creditors of the bankrupt railroad will receive all that they may Constitutionally claim.

Of course, the constitutional adequacy of any compensation ordered by the special court for interim erosion amounting to a taking would depend in large part on whether the basic objective of the Rail Act is achieved—whether, that is, the final system plan succeeds in establishing a profitable northeastern rail system. There can of course be no guarantee that that objective will be achieved, although, as we have shown (pp. 31–37, *supra*), the Rail Act appears to provide considerable promise of success.[22] But if the consideration ordered by the special court proves to be constitutionally inadequate, a complete remedy, as we now show, is available under the Tucker Act.

B. JUST COMPENSATION FOR ANY OTHERWISE UNCOMPENSATED TAKING IS AVAILABLE UNDER THE TUCKER ACT

The Tucker Act confers jurisdiction on the Court of Claims "to render judgment upon any claim against the United States founded * * * upon the Constitution * * *." 28 U.S.C. 1491. That Act consents to suits against the government for damages arising from otherwise unconstitutional takings. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U.S. 18. No provision of

[22] Apparently because Section 303, standing alone, does not guarantee the payment of just compensation for any taking resulting from interim erosion, the court below declared it unconstitutional. That holding was erroneous for two separate reasons. First, since, as we have shown above (pp. 16–37, *supra*), there will be no taking from interim erosion, it is not constitutionally necessary for Section 303 to compensate for such erosion. Second, since, as we show below (pp. 39–48, *infra*), appellees have an adequate remedy at law under the Tucker Act for any otherwise unconstitutional taking, there is no constitutional requirement that Section 303 itself guarantee just compensation. *Hurley* v. *Kincaid*, 285 U.S. 95.

the Rail Act by its terms either limits the jurisdiction of the Court of Claims or bars the estates of the debtor railroads from suing in that court.

The Tucker Act therefore would appear to provide an adequate remedy at law for any otherwise uncompensated taking arising under the Rail Act.[22] The district court below concluded, however, on the basis of its review of the legislative history, that the Rail Act deprives appellees of any remedy in the Court of Claims (J. App. 40–53). We disagree that a *pro tanto* repeal of the Tucker Act may be inferred from the Rail Act.

1. This Court historically has been reluctant to infer that later statutes bar suits under the Tucker Act. In *Amell* v. *United States*, 384 U.S. 158, for example, this Court declined to infer a withdrawal of the Court of Claims' jurisdiction over wage claims of federal employees working aboard government vessels, even though the subsequently enacted Suits in

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[22] The concurring judge below questioned whether even a Tucker Act remedy would be constitutionally adequate, stating that he found "it difficult to characterize as due process of law the notion that further interim erosion can be justified because, if the lengthy and complex procedures of the Act do not produce a constitutionally permissible result, the parties may then start over again in the Court of Claims" (J. App. 81). But it has long been recognized that "[w]here only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process * * *." *Phillips* v. *Commissioner*, 283 U.S. 589, 596–597. Moreover, any such postponement works no economic injury, for interest on just compensation awards runs from the date of taking. *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585; *Phelps* v. *United States*, 274 U.S. 341. See, also *Hurley* v. *Kincaid*, 285 U.S. 95. There can be no serious doubt, therefore, that the Tucker Act remedy is constitutionally adequate.

Admiralty Act, 46 U.S.C. 741 *et seq.*, vested in the district courts exclusive jurisdiction over suits of a maritime nature; the Court was unwilling to read into the Suits in Admiralty Act a "repeal * * * by implication" (384 U.S. at 165). See, also, *Hele* v. *United States*, 100 Ct. Cl. 289, 294. Cf. *United States* v. *Pfitsch*, 256 U.S. 547.

Accordingly, it has long been understood that the mere absence of a specific statutory provision for compensation does not deprive the Court of Claims of jurisdiction over just compensation claims, whether or not the government intended a taking. See *Armstrong* v. *United States*, 364 U.S. 40; *United States* v. *Dickinson*, 331 U.S. 745; *United States* v. *Causby*, 328 U.S. 256; *Jacobs* v. *United States*, 290 U.S. 13; *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327. In *Causby*, for example, this Court upheld the Court of Claims' jurisdiction over a claim that low and frequent flights of military aircraft took the property of the owner beneath the flight path, even though the Air Commerce Act of 1926, 44 Stat. 568, had granted the United States "complete and exclusive national sovereignty in the air space" over the nation.

Furthermore, this Court has refused to infer a *pro tanto* repeal of the Tucker Act even from a statute expressly exempting the United States from liability. In *Hurley* v. *Kincaid*, 285 U.S. 95, the plaintiff had sought to enjoin work on a government flood control project, alleging "that the project [would] expose his property to additional destructive floods" (285 U.S. at 100). Although the pertinent statute stated that "[n]o

liability of any kind shall attach to or rest upon the United States for any damage from or by floods" (285 U.S. at 102, n. 2), the Court held that injunctive relief was improper because, in the event of a taking, "the complainant can recover just compensation under the Tucker Act in an action at law" (285 U.S. at 104).

It is therefore clear that the mere absence in the Rail Act of any reference to the availability of a Tucker Act remedy cannot be read as negating that remedy. Nor is recourse to the Court of Claims barred by the fact that the legislative draughtsmen believed that no taking would occur. The consistent history of decisional law teaches that Congress may not be held to have withdrawn the jurisdiction conferred on the Court of Claims by the Tucker Act without compelling evidence of an explicit intention to do so.

As this Court has often observed, "repeals by implication are not favored[;] * * * [t]he intention of the legislature to repeal 'must be clear and manifest.'" *United States* v. *Borden Co.*, 308 U.S. 188, 198. See also *Shuttle Corp.* v. *Transit Comm'n*, 393 U.S. 186, 193; *Rosenberg* v. *United States*, 346 U.S. 273, 295. We now show that neither the language of the Rail Act nor its legislative history reveals a "clear and manifest" intention to repeal *pro tanto* the Tucker Act's grant of jurisdiction to the Court of Claims.

2. In several provisions of the Rail Act, Congress showed that, when it intended to repeal or limit the applicability of pre-existing statutes, it explicitly so stated. For example, the Sherman, Clayton, and Federal Trade Commission Acts are made "inapplicable

with respect to any action taken to formulate or implement the final system plan" (Section 601(a)(2)); the Interstate Commerce Act and the Bankruptcy Act are made "inapplicable to transactions under this Act to the extent necessary to formulate and implement the final system plan" (Section 601(b); see also Section 304(c)); and the National Environmental Policy Act "shall not apply with respect to any action taken under authority of this Act before the effective date of the final system plan" (Section 601((c)). Similarly, the requirement in Rev. Stat. 3709, 41 U.S.C. 5, that the government advertise for contract proposals is made inapplicable to certain government contracts entered into under the Rail Act. See Sections 202(a)(10) and 205 (c)(2). Certain provisions of the Judicial Code—not including the Tucker Act—are also overriden. See Sections 206(d)(3), 207(b), 209 (a) and (b), and 303 (b)(2) and (d). See, also, Section 304(f).

No provision, however, curtails the jurisdiction of the Court of Claims under the Tucker Act. "We are entitled to assume that * * * Congress legislated with care, and that had Congress intended to [make the Tucker Act also inapplicable], it would have said so expressly, and not left the matter to mere implication." *Palmore* v. *United States,* 411 U.S. 389, 395. As the many explicit limitations on other preexisting statutes illustrate, an express provision dealing with the Tucker Act "would have been easy." *Farnsworth* v. *Montana,* 129 U.S. 104, 113. It is therefore unreasonable to infer that Congress intended, by "mere implication", to bar recourse to the traditional Court

of Claims remedy in the event that the Rail Act should cause a taking of property without just compensation.

The court below apparently was persuaded, however, that the Rail Act established "a preemptive system of judicial participation [with] respect to the final system plan" (J. App. 46), because of the consolidation in the special court of "all judicial proceedings with respect to the final system plan" (J. App. 47). But the consolidation of such proceedings in the special court is irrelevant to the question whether a Court of Claims remedy remains at the close of those proceedings.[24]

Consolidation was necessary, among other reasons, because the function of "reallocating the securities of the Corporation in a fair and equitable manner if [they have] not been fairly allocated among the railroads transferring rail properties to the Corporation [under the final system plan]" (Section 303(c)(2)(A)) was one that had to be carried out by a single tribunal, acting with all the proceedings before it. More generally, consolidation was necessary to achieve a coordinated rather than piecemeal review of the final system plan; Congress' "experience in the environmental field indicated what a mess can be made of the best laid plans by a diversity of legal proceedings all over the Nation, with different theories canceling each other out very often, and not resolvable until

[24] Indeed, the lower court's exercise of jurisdiction in this case illustrates that it did not read the Rail Act as barring courts other than the special court from hearing claims arising out of enforcement of that Act.

you get to the Supreme Court * * *." 119 Cong. Rec. S 23780 (daily ed., December 21, 1973) (Senator Javits). The availability of a subsequent Court of Claims remedy does not interfere with that legislative purpose.

The court below appeared to be concerned that Section 303(e)(2)(C), which empowers the special court to enter a judgment against the Corporation if any lack of fairness and equity cannot otherwise be cured, implies that such a judgment is the exclusive remedy for takings arising under the Rail Act. That provision may evince a congressional presumption that no taking would arise under the Act, but we have already shown (pp. 41–42, *supra*) that the jurisdiction of the Court of Claims over just compensation claims is not dependent upon a government intent to commit a taking. Moreover, Section 303(e)(2)(C) merely states the limit of the special court's power to award fair and equitable consideration to the estates of the railroads in reorganization. It does not deprive the Court of Claims of power to determine the constitutional adequacy of that consideration.

The special court may enter a judgment pursuant to Section 303(e)(2)(C) equal to the amount by which the securities, obligations, and other benefits otherwise received by the debtor railroads fall short of the statutory requirements of fairness and equity. Whether such a judgment would have any value to the debtor railroads[25] and, if so, whether that value would be

[25] The court below may have assumed that since the debtor railroads—and ultimately their creditors—would be the shareholders of the Corporation, they would derive no benefit from

sufficient to satisfy the Fifth Amendment, would not be resolvable in the special court. But those questions would be appropriate for consideration by the Court of Claims in a subsequent suit for just compensation. Thus the logic of the statutory scheme itself suggests, contrary to the holding below, that there was no congressional intention to divest the Court of Claims of jurisdiction to hear just compensation suits based upon alleged takings arising under the Rail Act.

3. The entire legislative history relied upon by the court below consisted of a single remark made by Senator Hartke during floor debate and a short colloquy between Representatives Kuykendall and Adams in the House. Neither the remark nor the colloquy suggests that Congress intended to deprive creditors of a Tucker Act remedy.

Senator Hartke, in explaining why in his view it would be necessary to provide the creditors of the debtor railroads with equity interests in the Corporation, stated that "[i]f we did nothing while continuing to mandate rail service, there is the distinct possibility * * * that a number of these people could make a claim against the Government which could be sustained in the Court of Claims." 119 Cong. Rec. S 23783 to S 23784 (daily ed., December 21, 1973). The Senator's

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the entry of judgment under Section 303(c)(2)(C). Such an assumption would not be entirely correct. Appellees would obviously benefit to the extent that their claims as judgment creditors had priority over nonshareholder claims, such as those of the Association (see p. 31, *supra*). Moreover, appellees' recovery on the judgment would probably escape taxation as a return of capital, whereas other payments by the Corporation to its shareholders would ordinarily be subject to taxation as dividend payments.

evident concern was with providing sufficient compensation to prevent a Tucker Act claim from being "sustained," not with denying the remedy. He believed that the Corporation would be profitable (*id.*, at S 23784) and therefore that the stock interests transferred to the creditors would be constitutionally adequate. Thus the Senator's remark is most reasonably interpreted as expressing a belief that, although creditors would be able to assert Tucker Act claims at the close of proceedings under the Rail Act, such claims would have no factual basis in view of the consideration to be provided.

The colloquy between Representatives Kuykendall and Adams concerned the operation of Section 303(*c*)(2)(C), which permits the special court to enter a deficiency judgment against the Corporation. Representative Kuykendall asked, "There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors; is that correct?" 119 Cong. Rec. H 11876 (daily ed., December 20, 1973). Representative Adams replied, "The gentleman is correct." *Ibid.* The gentleman was correct. Any deficiency judgment entered by the special court would be enforceable only against the Corporation; the special court is granted no jurisdiction to enter judgments against the United States. That fact, of course, does not negate the possibility of a subsequent suit in the Court of Claims.

Representative Adams also stated (*ibid.*):

> * * * [T]here is a definite limitation on the total amount that can be authorized *under this bill*. [Congress may by joint resolution approve

> the issuance of additional federally guaranteed securities of the Corporation or association,[26] but] it was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees. [Emphasis added.]

This statement, contrary to the reading of the court below, indicates an awareness that creditors' interests are protected by a constitutional guarantee.[27] Representative Adams apparently assumed that any constitutional deficiency in the consideration ordered by the special court would be supplied by additional federal assistance made available by joint resolution of Congress, but nothing he said denies the availability of a Court of Claims remedy in the event that constitutionally adequate consideration is not otherwise paid.

4. In short, the court below erred in inferring a congressional intent to deprive the Court of Claims of jurisdiction over just compensation suits arising from transactions under the Rail Act. Appellees have an adequate remedy at law for any takings resulting from enforcement of the Rail Act; they are not entitled to injunctive relief. *Hurley v. Kincaid, supra.*[28]

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[26] See Sections 206(i) and 210(b) of the Rail Act.

[27] Representative Adams had earlier asserted that "we have done everything possible * * * to make certain that *no more than the constitutional minimum* * * * will be paid by the new corporation." 119 Cong. Rec. H 9732 (daily ed., November 8, 1973) (emphasis added).

[28] But if this Court should conclude, contrary to our submission, that no Court of Claims remedy would be available, the injunction against enforcement of Section 304(f) should nevertheless be modified to ensure that the Association would not be barred from prohibiting discontinuance of service or abandonment of lines pending any appeal from an adverse deter-

III

SECTION 207(b) OF THE RAIL ACT IS NOT INVALID AS A GEOGRAPHICALLY NONUNIFORM LAW ON THE SUBJECT OF BANKRUPTCIES

Section 207(b) of the Rail Act requires "each United States district court or other court having jurisdiction over a railroad in reorganization [that] * * * finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization * * * [to] dismiss the reorganization proceeding." The district court correctly noted (J. App. 64–65) that that provision deprives railroads in reorganization of the opportunity, afforded under Section 77 of the Bankruptcy Act, 11 U.S.C. 205, of undergoing a liquidating reorganization.[29] The court thereupon held it invalid as a geographically nonuniform law on the subject of bankruptcies.[30] We disagree.

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mination of a reorganization court that continued loss operations would constitute a taking. The Fifth Amendment should not prevent orderly prosecution of appeals from such determinations.

[29] This fact, however, would appear to have little if any intrinsic significance. Dismissal of the reorganization proceeding would mean, as a practical matter, only that liquidation would be carried out in a federal equity receivership rather than in the reorganization court. It is unclear what difference this would make to either debtor or creditors. Certainly it would not appear to affect creditors adversely. Indeed, appellee Smith has already filed a motion to dismiss the Penn Central reorganization proceeding and to convert that proceeding into a federal equity receivership. See Document 6351 in those proceedings; Corp. Reorg. Rept. (Penn Central), p. 1011:4794.

[30] Judge Aldisert, observing that all creditors of the railroads in reorganization are treated alike, dissented (J. App. 26–29).

We acknowledge, of course, that Congress, in exercising its power under Article I, Section 8, clause 4 to enact laws on the subject of bankruptcy, is subject to the requirement that those laws be geographically uniform. See *Hanover National Bank* v. *Moyses*, 186 U.S. 181. But the first thing to note about Section 207(b) is that it does not, by its terms, discriminate geographically; it applies, without geographic limitation, to "each United States district court or other court having jurisdiction over a railroad in reorganization."[31] The only express limitation is temporal rather than geographic: since the determination of the fairness and equity of the process under the Rail Act must be made within 180 days after the date of enactment,[32] the dismissal provision affects only railroads

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on the ground that the uniformity provision of the bankruptcy clause requires only that bankruptcy laws make no invidious geographic distinctions among creditors.

[31] The district court assumed that Section 207(b) applies in a geographically nonuniform manner presumably because the Rail Act is concerned with restructuring only the rail system of the northeastern States; and Section 207(b) does refer at one point to "the strong public interest in the continuance of rail transportation in the region." ("Region" is defined as covering seventeen States and the District of Columbia; see Section 102(13).) The failure to limit the application of Section 207(b) to railroads in reorganization "in the region" may have been due to a drafting oversight. The findings required under Section 207(b) are designed to determine which railroads will be eligible for inclusion in the final system plan, and the Rail Act contemplates that only "rail properties of railroads in reorganization in the region" and "rail properties of profitable railroads operating in the region" are to be transferred to the Corporation pursuant to the plan. See Section 206(c)(1) and (2).

[32] The determination must be made "[w]ithin 60 days after the submission of the report by the Office, under section 205

in reorganization on January 2, 1974 or which entered reorganization within 180 days thereafter.

The fact that Section 207(b) is facially uniform in its geographic application is important. This Court would not only have to depart from the plain meaning of the statutory language in order to strike down Section 207(b), it would also be required to read into the statute the very nonuniformity which, appellees contend, renders the statute unconstitutional. Such a procedure is wholly contrary to this Court's normal practice. This Court often has noted (*United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 369):

> "[W]hen the validity of an act of the Congress is drawn into question, and * * * a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932). Accord, *e.g.*, *Haynes* v. *United States*, 390 U.S. 85, 92 (1968) (dictum); *Schneider* v. *Smith*, 390 U.S. 17, 27 (1968); *United States* v. *Rumely*, 345 U.S. 41, 45 (1953); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

Moreover, no legitimate purpose would be served by construing Section 207(b) as having a narrower geographic reach than it appears to have on its face. It is a matter of public record that no railroad reorganization proceeding, within the meaning of the Rail Act, was pending outside the northeast region

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(d)(1) * * *." The latter provision requires submission of the report within 120 days after the date of enactment.

during the 180-day period of that statute's effectiveness.[33] The actual geographic reach of Section 207(b) therefore cannot be affected by this litigation. Especially in these circumstances, this Court should not strain to read the statute in a manner that raises constitutional doubts.

But the fact that no railroad reorganization proceeding was pending outside the northeast region during the critical 180-day period has an additional and greater significance. It means that the statute has not been and never will be applied in a geographically nonuniform manner; no proceeding has been or ever will be either included or excluded from the statute's reach merely upon the basis of geography. Accordingly, in no meaningful sense may it be said that Section 207(b) is geographically nonuniform.

It is true that the only proceedings to which Section 207(b) in fact applied were located within the northeastern region of the country. But this Court long ago put to rest any notion that constitutional uniformity provisions require statutes to have practical application in all sections of the nation. For example, in

[33] Section 77(a) of the Bankruptcy Act requires any railroad filing a petition for reorganization to file a copy of its petition with the Interstate Commerce Commission. The copy is left on file in the Commission's Finance Dockets. The Dockets show that the corporate shells of two railroads—the New Haven and the Tennessee Central—are still subject to the jurisdiction of their respective reorganization courts, but each corporation had sold its rail properties and terminated operations as a common carrier prior to enactment of the Rail Act. Those corporations therefore are not "railroads" within the meaning of Section 102(11) of the Rail Act. See *In re New York, New Haven, and Hartford Railroad Co.*, No. 30226, Order No. 720, decided February 14, 1974 (D. Conn.).

the *Head Money Cases*, 112 U.S. 580, 594, the Court upheld a tax on ship owners that had practical application only to the Port of New York, stating:

> The tax is uniform when it operates with the same force and effect in every place where the subject of it is found. The tax in this case * * * is uniform and operates precisely alike in every port of the United States where such passengers can be landed.

See also *Knowlton* v. *Moore*, 178 U.S. 41;[34] *Nicol* v. *Ames*, 173 U.S. 509; *Leidigh Carriage Co.* v. *Stengel*, 95 Fed. 637 (C.A. 6). The Rail Act passes constitutional muster under this test: it applies with the same force and effect wherever railroad reorganizations are found.[35]

Moreover, the dismissal provision of Section 207(b) applies equally to all creditors, no matter where they are located.[36] See J. App. 27. That is all the bankruptcy clause requires. See *Vanston Bondholders Protective Committee* v. *Green*, 329 U.S. 156, 172 (concurring opinion of Justice Frankfurter).

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[34] The internal revenue laws have long contained provisions narrowly tailored to the special circumstances of a single individual or a small group of taxpayers, and such provisions, cast in general terms, are tolerated under the constitutional requirement of geographic uniformity. See generally Cary, *Pressure Groups and the Revenue Code: A Requiem in Honor of the Departing Uniformity of the Tax Laws*, 68 Harv. L. Rev. 745 (1955).

[35] Congress legislated for the rail transportation crisis wherever it existed. National bankruptcy legislation may constitutionally accommodate itself to local conditions, needs, and practices. See *Wright* v. *Vinton Branch of Mountain Trust Bank*, 300 U.S. 440, 463, n. 7; *Stellwagen* v. *Clum*, 245 U.S. 605; *Hanover National Bank* v. *Moyses*, *supra*, 186 U.S. at 190.

[36] Section 207(b) also applies equally to all debtors; it applies to all railroads actually in reorganization.

Moreover, the Rail Act was enacted as an exercise not only of the bankruptcy but also of the commerce power. Congress found and declared that "[t]he public convenience and necessity require adequate and efficient rail service * * * to meet the needs of commerce * * *." Section 101(a)(3). Legislation enacted under the commerce clause need not apply uniformly throughout the United States. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 616; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178, 184; *Currin* v. *Wallace*, 306 U.S. 1, 14. Furthermore, Congress may, in the exercise of its commerce power, enact incidental nonuniformities in areas of the law otherwise governed by uniformity requirements.

For example, this Court has held that Article I, Section 9, Clause 6, which bars Congress from giving "Preference * * * to the Ports of one State over those of another," prohibits only legislation that purposefully discriminates against particular ports. *Armour Packing Co.* v. *United States*, 209 U.S. 56. Congress remains free, therefore, to provide for the construction of bridges, lighthouses, roads and other improvements even though the effect of such legislation is to favor one port over another. See *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 18 How. 421; see also *Louisiana Public Service Comm'n.* v. *Texas & New Orleans R.Co.*, 284 U.S. 125, 131. Accordingly, any otherwise invalid nonuniformity that the Rail Act may have temporarily imported into the national bankruptcy laws should be sustained as a proper exercise of commerce power.

IV

THERE IS NO BASIS FOR ENJOINING THE ASSOCIATION FROM CERTIFYING A FINAL SYSTEM PLAN

The district court found two constitutional defects in the Rail Act—that Section 304(f) permits takings, through interim erosion, for which there is no provision for just compensation, and that Section 207(b) establishes an invalid geographically nonuniform bankruptcy rule for the dismissal of railroad reorganization proceedings. On the basis of these determinations, the court (1) enjoined the defendants from enforcing Section 304(f) in a manner that would require interim erosion that had been adjudicated by a court of competent jurisdiction to constitute a taking, (2) enjoined all parties from enforcing the dismissal provision of Section 207(b), and (3) enjoined the Association from certifying a final system plan to the special court pursuant to Section 209(c).

The district court's injunctions against enforcement of Section 304(f) and the dismissal provision of Section 207(b) interfere, in greater and lesser ways, with the operation of the Rail Act. But the injunction against certification of a final system plan completely nullifies the entire statutory scheme. Without certification, there can be no transfer of rail properties to the Corporation; without such a transfer, there can be no restructuring of the northeastern rail transportation system under the Rail Act.

We have shown at length above that the district court erred in finding any constitutional defect in the Rail Act. There was, therefore, no basis for the issuance of any of the injunctions. But even assuming

arguendo that the court properly enjoined enforcement of Sections 304(f) and 207(b), there was nevertheless no basis for its injunction against certification of a final system plan.

The dismissal provision of Section 207(b) operates long in advance of certification; it applies only to proceedings in which the reorganization court has determined that the properties of the debtor railroad subject to its jurisdiction will not be eligible for transfer to the Corporation under the final system plan. Thus the validity of the certification process is wholly unaffected by the validity *vel non* of the Section 207(b) dismissal provision. Moreover, by restraining enforcement of the dismissal provision, the district court cured any constitutional deficiency.

If the district court was correct in reading Section 304(f) to permit takings through interim erosion for which there is no provision for just compensation, that constitutional deficiency is fully cured by allowing the debtor railroads to discontinue service and abandon lines upon a showing that further loss operations would cause interim erosion amounting to a taking. That, of course, is the effect of the district court's injunction barring the defendants from enforcing Section 304(f) in a manner that would require the continuation of interim erosion that is, or has been, adjudicated to be a taking. Once any unconstitutional interim erosion is barred by injunction, no legitimate purpose is served by further barring certification of the plan. Furthermore, certification could not add to appellees' injury in any case. Certification of a final system plan triggers the transfer

of properties pursuant to the plan (see Section 303 (a)), and therefore acts to terminate the interim period during which unconstitutional erosion allegedly may occur.

In short, the constitutional deficiencies, if any, in Sections 304(f) and 207(b) would not, even if uncured, afford a basis for enjoining certification of a plan. Since the district court cured any alleged deficiencies in those provisions, it clearly erred in further enjoining certification.

CONCLUSION

For the reasons stated above, the judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

The Record Does Not Show Any Substantial Likelihood of Erosion in the Penn Central Estate Pending Implementation of the Final System Plan

A. THE RECORD IS INADEQUATE

The record in the Penn Central reorganization proceedings is so scanty that the Interstate Commerce Commission in its Preliminary Report and Order of September 28, 1973, found it impossible to make any finding on the nature and extent of alleged erosion of the estate. See *Penn Central Transportation Co. Reorganization,* Corp. Reorg. Rept. (Penn Central), Document No. 95, at 1102: 86, 109 (ICC Finance Docket No. 26241, Sept. 28, 1973). (ICC Finance Docket No. 26241 is hereinafter referred to as the "ICC Proceeding.") Those supporting dismissal of the proceedings and liquidation of the estate have the burden of proving erosion, and they have "made no serious efforts to marshal and present such information[;] * * * [t]his information is important, since the greater the [claimants'] cushion and the slower the rate at which their security is eroding, the less dire for them the consequences of delay." *In re Boston and Maine Corp.,* 484 F. 2d 369, 372–375 (C.A. 1); see also *New Haven Inclusion Cases,* 399 U.S. 392, 492–493. They failed to make this showing to the Commission's satisfaction, and little additional evidence has been furnished to the reorganization court. The following are the primary sources of data in the record:

1. Penn Central's ICC Railroad Annual Report Form A ("Form A") for 1970, 1971, and 1972; and

Penn Central's ICC Annual Report Form R–1 ("Form R–1"), which replaced Form A, for 1973.

2. For data on the valuation of rail properties, the Day and Zimmerman Report, Appendix 1 to Statement of William R. Carlisle, introduced by the Penn Central Trustees as Ex. 21 in the ICC Proceeding, Aug. 6, 1973 ("Day and Zimmerman Report"). This valaution, however, is only as of December 31, 1970. It fails to reflect more than $300 million in additions and betterments made by the Penn Central Trustees since bankruptcy. It gives no effect to the substantially increased maintenance-of-way and track-replacement programs carried out by the Trustees since bankruptcy. See Appendix A to Statement of Clarence E. Jackman, Ex. 18 in the ICC Proceeding, Aug. 6, 1973 ("Jackman ICC Ex. 18"). It does not show the value added to the estate by the increase in the price of scrap steel since 1970,[37] or any other appreciation in value, such as increases in the value of real estate devoted to rail operations.

3. For the value of non-rail real estate, Victor Palmieri & Co. Report, Ex. 25 in the ICC Proceeding ("Palmieri Report"). The Penn Central Trustees employed Palmieri & Co. to catalogue, develop, and

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[37] The trade publication "Iron Age" indicates that the market value of heavy melting scrap iron has dramatically increased since June 21, 1970:

MARKET PRICES FOR NO. 1 HEAVY MELTING SCRAP AT SELECTED LOCATIONS ($/TON)

	Prices on June 22, 1970 [a]	*Prices on July 15, 1974* [b]
Chicago	$43–$44	$137–$138
Pittsburgh	$42–$43	$129–$130
Philadelphia	$43–$44	$118–$120

[a] Iron Age, June 25, 1970, at 84.
[b] Iron Age, July 22, 1974, at 64.

market Penn Central's non-rail real estate. See *In re Penn Central Transportation Co.*, Bky. No. 70–347, Memorandum and Order No. 1397, Corp. Reorg. Rep. (Penn Central), Document No. 6195, at 1011:4772 (E.D. Pa., Aug. 31, 1973) and Order No. 1344, Corp. Reorg. Rep. (Penn Central), Document No. 6386, at 1011:4793 (E.D. Pa., Oct. 9, 1973).

4. For Penn Central's various investments, and an estimate of the erosion of the estate, the affidavit of John S. Guest in the ICC Proceeding ("Guest ICC Ex. 22")[38] together with his work papers[39] and cross-examination. Guest updated his testimony at the 120-day hearing on March 25, 1974, by means of an additional affidavit on which he was cross-examined.

The validity of Guest ICC Ex. 22, and the weight to be attached to it, are weakened by several factors. Despite Guest's obvious qualifications, the time constraints under which he prepared his study[40] mean that it is not entitled to the weight of a study prepared over a longer period of time and in greater depth. For example, Guest was not able to formulate a method for computing "reasonable use and occupancy payments," in lieu of leased line rentals, or to estimate the amount of claims which Penn Central might have against leased line lessors in the event of disaffirmance of particular leases for reimbursements of losses incurred by Penn Central since bankruptcy in the operation of the leased lines. Guest ICC Tr. at 1875–1876. Nor was he able to estimate whether

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[38] Statement of John S. Guest, Corp. Reorg. Rept. (Penn Central), Document No. 22, at 1102:32.

[39] Guest ICC Ex. 23, *Penn Central Transportation Co.—Erosion of the Estate* and Guest ICC Ex. 24, Summary.

[40] June-August, 1973. Pre-Hearing Conference Transcript, ICC Finance Docket No. 26241, at 1813 (Aug. 22, 1973) ("Guest ICC Tr.").

any issues of the Penn Central's mortgage and collateral trust bonds were more than fully secured and therefore entitled to post-bankruptcy interest. Guest ICC Ex. 22, at 7; Guest ICC Tr. at 1877–1878.

Guest was unable to make any more than a rough estimate of the increase or decline in the value of the Penn Central's rail plant and equipment between the date of bankruptcy and May 31, 1973, based on changes in book value between December 31, 1969 and December 31, 1972. He did not determine how much of this decline in book value was attributable to sales of land. Although he used increases in book depreciation to calculate the $68 million decline in the value of Penn Central's road property, he was unable to determine whether any of the increase in depreciation resulted from replacement of older depreciated property and additions and betterments. Guest ICC Tr. at 1901, 2685. Nor could Guest have considered Jackman's opinion that a very substantial part of present deferred maintenance could have been avoided, if the plant had had normal maintenance during the period 1957–1969. Jackman ICC Tr. at 1085–1088. Guest did not have available to him Appendix A to Jackman ICC Ex. 18, showing dramatic, post-bankruptcy increases in total maintenance-of-way expenses, cross-tie installations, new rail installation, and expenditures on depreciable property accounts. Guest ICC Tr. at 1902–1905.

Guest did not include in Guest ICC Ex. 22 some important information contained in his work papers (Guest ICC Ex. 23). Guest ICC Tr. at 1845–1849. Without this information, parts of his statement could have distorted the true economic picture. He also modified his own definition of erosion to accord with the views of Trustees' counsel, because he believed that "they knew more about erosion than I did." Guest ICC Tr. at 1845.

Guest's testimony suffers from the same lack of detailed preparation which weakened Guest ICC Ex. 22. He continued to include in his calculation of post-bankruptcy taxes substantial amounts (approximately $45 million) that had in fact accrued prior to bankruptcy. Compare Guest's testimony in the reorganization court, Transcript at 11,254–55 (E.D. Pa., March 25, 1974) ("Guest 120-day Tr.") and before the Commission, Guest ICC Tr. at 1871–1872, with the remarks of Paul Duke in the ICC Proceeding, ICC Tr. at 1497. Moreover, as in Guest ICC Ex. 22, Guest used income statement loss as a means of defining erosion. This theory is subject to severe criticism, as is shown below.

5. For the value of stock of Pennsylvania Company, see *In re Penn Central Transportation Co.*, 358 F. Supp. 154 (E.D. Pa.) (rejecting a proposed claim settlement involving Pennsylvania Co. Stock).

6. For projections of future erosion, the affidavits of Ernest Varalli and John Guest, introduced at the reorganization court's 120-day hearing under Section 207(b) of the Act ("120-day Aff.").

B. INCOME STATEMENT LOSSES OVERSTATE EROSION

Penn Central sustained ordinary net losses of approximately $851 million during the period from June 21, 1970 to December 31, 1973. This figure is based upon Penn Central financial statements prepared according to ICC accounting rules. It is not, however, an accurate measure of real erosion. It includes many items which do not reflect either an accumulation of administration expenses or an actual decline in the value of the estate. For example:

1. *Income statement depreciation—more than $318 million.*[41] Income statement depreciation is an accounting charge against current income, made to allocate the cost previously incurred in acquiring an asset. It does not necessarily reflect a real change in the value of the assets of the estate.[42]

2. *Track replacement—$358 million.* Under the Commission's accounting regulations, Penn Central is required to list as operating expenses the costs of replacing rail, ties, ballast and other track material with new or reusable rail, ties, ballast and other track material of similar characteristics. See 49 C.F.R. Part 1201, Sections 8 through 12, and 212 through 220. These items do not represent the accumulation of prior administration claims or any decline in the value of the estate. Indeed, they reflect no injury to the claimants at all. The replacement of track structure has the effect of preventing a decline in the value of the Penn Central rail estate and probably increases its value.

3. *Deferred leased line rentals—approximately $101 million.* It cannot be determined at this time whether unpaid leased line rentals are in fact valid administration claims against the estate. See Stipulation of Fact, par. 13 (J. App. 321–322). This is because, in the

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[41] For 1973, $89 million, 1973 Form R-1, at 93, 1.2; for 1972, $88.7 million, 1972 Form A at 93, 1.2; for 1971, $90.6 million, 1971 Form A at 304, 1.48 and at 306, 1.94; for June 21, 1970—December 31, 1970 (199 days)—approximately 53% of full year 1970 ($94.8), as shown on 1970 Form A at 304, 1.47 and at 306, 1.94—$50.6 million.

[42] In his testimony before the Commission, Guest found no change in the value of the plant and equipment of Penn Central during the period June 21, 1970 to May 31, 1973, despite the accumulation of income statement depreciation during that period. Guest ICC Tr. 1861–1862, 1959; see also Guest ICC Ex. 22, at 5.

event of disaffirmance, losses incurred by the Penn Central in operating the leased lines during bankruptcy can be offset against claims by the lessors for unpaid rentals. See Section 77(c)(6) of the Bankruptcy Act, 11 U.S.C. 205(c)(6); *In re Penn Central Transportation Co., Secondary Debtors,* Bky. Nos. 70–347A through 70–347O, Memorandum, Corp. Reorg. Rept. (Penn Central), Document No. 74–68, at 1011: 5096 (E.D. Pa., May 2, 1974).

4. *Deferred bond interest—approximately $104 million.* Here again it cannot be determined yet which issues of bonds are fully secured and thus entitled to post-bankruptcy interest. See Stipulation of Facts par. 14 (J. App. 322). Generally, post-bankruptcy interest is payable as an administration expense only to the extent that it is actually secured. See *In re New York, New Haven & Hartford Railroad Co.,* 304 F. Supp. 1121 (D. Conn.). Moreover, if the deferred bond interest is payable, it obviously benefits rather than harms any bondholders entitled to the interest.

5. *Post-bankruptcy interest on unsecured or inadequately-secured pre-bankruptcy debt—approximately $146.3 million.* See 1973 Form R–1, at 51a–51c. As noted above, post-bankruptcy interest is generally payable only if it is secured. Post-bankruptcy interest on unsecured obligations does not reduce the size of the estate or the amount available for payment to creditors.

In summary, then, the income statement may overstate the real economic consequences of continuing operations by as much as $1,027 million:

	Millions
Income statement depreciation	$318
Track replacement	258
Leased line rentals deferred	101
Deferred bond interest	104
Postbankruptcy interest on prebankruptcy unsecured or inadequately secured debt	146
Total	1,027

C. USE OF NON-RECURRING CASH ITEMS AND NON-RAIL INCOME EXAGGERATES EROSION OF THE ESTATE

From June 21, 1970 to December 31, 1973, the Penn Central Trustees expended approximately $137.5 million of non-recurring cash items, including $100 million in drawdowns of guaranteed trustees certificates; they expended $2.1 million in proceeds from sales of mortgaged properties; they expended $15.7 million in proceeds from the "Agnes" flood loan; and they expended approximately $157 million in income derived from so-called non-rail properties. See J. App. 36–37 n. 17. Appellees contended in the court below that these items constitute erosion of the estate.

The expenditure of non-recurring cash proceeds and non-rail income does not *per se* reduce the size of the estate. The record indicates that during the post-bankruptcy period at least $206.5 million was invested in reducing outstanding equipment debt, thus increasing the estate's equity in readily salable railroad equipment.[43] During this same period, more than $137.9 million was invested in additions and betterments to mortgaged and unmortgaged transportation

[43] See Guest Ex. 24, which shows that equipment debt outstanding was reduced from $542 million at June 30, 1970, to $364 million as of May 31, 1973. Penn Central Forms A and R–1 for 1970–1973 show the following payments of equipment obligations:

1973—$51.7 million (Form R–1, at 51E–P).
1972—$59.7 million (Form A at 50–51H).
1971—$60.2 million (Form A at 236–237H).
1970—$34.9 million (53% of full year; Form A at 237 A–L).

property.[44] Thus non-recurring cash proceeds and non-rail income was not used merely to subsidize loss operations but rather was converted into valuable rail properties that maintain or enhance the value of the estate. The $310 million in non-rail income and non-recurring cash items characterized as erosion by the creditors is more than offset by the $344 million in additions and betterments and equipment investments that confer positive benefits on the estate.

D. THERE IS NO EVIDENCE OF SUBSTANTIAL NET INTERIM EROSION

Although the record is inadequate as a basis for accurate assessment of the impact of continued operations on Penn Central, a tentative summary is possible.

Prior administration claims of $457 million have accumulated (as of December 31, 1973):

a. trustees certificates—$100 million
b. accrued post-bankruptcy state and local taxes—$195 million[45]
c. increase in current liabilities—$162 million[46]

As we now dicuss, however, the effect of these accumulated claims may be offset entirely or in large part by increases in the value of the assets of the estate:

a. Plant and equipment—$85 million to $360 million.

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[44] Additions and betterments to transportation property:
1973—$25.7 million (Form R-1, at 30-31).
1972—$20.8 million (Form A at 30-31).
1971—$50.6 million (Form A at 220-221).
1970—$33.5 million (53% of full year; Form A at 221).

[45] See Stipulation of Facts, par. 12 (J. App. 321).

[46] Compare Guest ICC Ex. 24, at 6, for June 21, 1970 ($301 million) with 1973 Form R-1, at 11, 1.59 ($463 million).

b. Investments—$53 million to $100 million.[47]

c. Other balance sheet assets, offset by declines in current assets, adjusted for accounting adjustments and declines in injury and loss and damage reserves—$80 million.

d. Other assets (mainly capital and other reserve funds)—$50 million.

Increases in the Value of the Plant Equipment—$85 million to $360 million

An evaluation appraisal is the best way of measuring any increases in the value of Penn Central's plant and equipment, and no sufficiently recent appraisal is currently available for the purpose. Estimates based upon changes in net book values are unsatisfactory, especially in a period of rapid inflation. Nevertheless, it is significant that net book value in freight equipment and road properties has increased by $89 million over the period of reorganization. See Guest ICC Ex. 24, at 9–16.[48] But substantial additions to the road properties were not reflected in the balance sheets. As indicated above (p. 64, *supra*), the Penn Central Trustees expended approximately $358 million for track replacement during the period 1970–1973. This expenditure was charged to operating expenses, even though the replacement of old track with new track, old ties with new ties, etc., must have substantially increased the value of the estate.

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[47] This estimate does not include any increase in the value of Penn Central's non-rail real estate or its holdings in Manor Real Estate, which owns substantial coal-producing properties.

[48] Passenger cars carried at $70 million on Penn Central's books were sold to the National Railway Passenger Corporation at a substantial book loss in 1971.

Increases in the Value of Investments—$53 million to $100 million [49]

The only investment whose value is fairly capable of estimation—Penn Central's holdings in the Pennsylvania Company—has increased in value since the filing of the reorganization petition. Guest testified that if the Trustees had determined at the date of filing to sell the Penneo stock, he, as a financial adviser, having made the kind of study which he deemed appropriate, would have advised a potential buyer that the value of Penneo was in the neighborhood of $150 million. Guest ICC Tr. at 1951–1954. By his own estimate, the sale value of the Penneo stock has increased to at least $203 million. Guest ICC Ex. 22. And the reorganization court recognized an outside value of $250 million. See 358 F. Supp. at 154.

Other Balance Sheet Assets with Appropriate Offset—$80 million

From a comparison of Penn Central's Form R–1 for December 31, 1973, with Guest ICC Ex. 24, at 6, 16–17, for June 21, 1970, it appears that "other assets" [50] increased by $48 million (from $37.7 million to $85.7 million); liability reserves for injury and freight loss and damage decreased by $9.5 million (from $85.1 million to $75.6 million);[51] book value of current assets decreased by $21.3 million (from $483.8 million to $462.5 million), but a positive adjustment of $43 million resulted in a net increase of $22 mil-

[49] Guest ICC Ex. 22 asserts a decline in the value of Penn Central's investments of $120 million, resulting principally from reduced valuations of Manor Real Estate Co. and Pittsburgh & Lake Erie R.R. Co. The government was not permitted to cross-examine with respect to those valuations.

[50] 1973 Form R–1, at 10, 1.42.

[51] Account 774, *11* 4, 5 and 6, 1973 Form R–1, at 57. A decrease in liability is of course equivalent to an increase in assets.

lion in current assets.[52] These items therefore show a net asset value increase of approximately $80 million.

Other Assets—$50 million

On Guest ICC Ex. 24, at 3, Guest shows that capital and other reserve funds in the hands of Penn Central have increased by approximately $50 million since the date of bankruptcy.

E. THE VALUE OF THE ESTATE APPARENTLY SUBSTANTIALLY EXCEEDS THE AMOUNT OF CLAIMS AGAINST THE ESTATE

Evidence in the record indicates the following values for assets of the Penn Central estate:

1. Rail assets, less equipment, as of December 31, 1970, as shown in the Day & Zimmerman physical asset valuation study—$1.456 billion net liquidation value or $2.857 billion gross liquidation value.[53]

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[52] Guest characterized part of the decline in current assets as being an accounting adjustment not reflecting "an actual deterioration of PCTC's financial condition." Guest ICC Ex. 23, at 7.

[53] These valuations include assets leased to Penn Central. Most of the "leased line companies" are controlled by the Penn Central Transportation Company. The book value of Penn Central's investments in its leased line and affiliated companies is substantial. See 1973 Form R-1, pp. 20–23. The leased line companies own substantial amounts of railroad operating assets, and approximately $600 million in non-rail real estate. ICC Ex. 25. Not to take account of Penn Central's investment in its leased line and affiliated companies would be to undervalue the Penn Central estate substantially. On the other hand, no summary of claims against the leased line companies in reorganization is included in the record. These claims may be substantial. To compensate for that fact, we have omitted (albeit somewhat arbitrarily) from the value of the Penn Central estate all of the non-rail real estate owned by the leased line companies. See note 54, *infra*.

2. Penn Central's equity in freight equipment, adjusted for inflationary factors, as shown by Guest ICC Ex. 24, at 10, as of May 31, 1973—$805 million.

3. Penn Central's adjusted book value for passenger cars as of May 31, 1973, as shown on Guest ICC Ex. 24, at 11—$10.4 million.

4. Current assets, less materials and supplies, as shown on the balance sheet as of December 31, 1973 (Form R–1)—$389.3 million.

5. Special funds as shown on the December 31, 1973 balance sheet (Form R–1)—$78.0 million.

6. Other assets and deferred charges as shown on the December 31, 1973 balance sheet (Form R–1)—$124.9 million.

7. Wholly-owned non-rail real estate, as shown in the Palmieri Report, ICC Ex. 25—$400 million.[54]

8. The Penneo stock, as valued by the reorganization court, 358 F. Supp. 154—$250 million.

9. Other investments, as valued by Kuhn, Loeb & Co. (Guest ICC Ex. 22)—from $297.2 million to $413.1 million.

10. Book value of capital expenditure for additions and betterments in 1970–1973, as shown on the Forms A and R–1 for those years—$138 million.

Accordingly, the net value of the estate may be as high as $3.97 billion, $5.50 billion or higher.

The claims against the estate are reflected on the balance sheet (1973 Form R–1) and the Trustees' report on proofs of claim, Attachment 5 to the April 1,

[54] This figure does not include the value of the interest of Penn Central's leased lines in real estate, which the Palmieri Co. reported as adding an additional $600 million of value.

1972 plan for reorganization. The Trustees' report estimates the total amount of valid pre-bankruptcy claims at $1.583 billion. The balance sheet shows current liabilities of $463 million, and liabilities for personal injury, freight loss and damage of $75.7 million. 1973 Form R–1, at 57, 11.4, 5 and 6. (Liability on equipment obligations is not included here because the equipment was valued above on a net equity basis.) The estate is also liable for $100 million in trustees certificates, $195 million in post-bankruptcy taxes, $45 million in prebankruptcy taxes, a maximum of $104 million in accrued bond interest, and, to the extent not offset by the Penn Central Trustees' claims, $101 million in deferred leased line payments. Valid prebankruptcy and post-bankruptcy claims, including deferred bond interest and deferred leased line rents, therefore apparently total no more than $2.67 billion.

F. THERE IS NO ADEQUATE BASIS IN THE RECORD FOR ESTIMATING PROSPECTIVE EROSION IF RAIL OPERATIONS CONTINUE THROUGH 1975

The evidence in the record for projected erosion through 1975 consists mainly of the affidavits of Ernest Varalli and John Guest. They project an additional $118 million in taxes and a maximum of $110 million in additional deferred leased line rentals and bond interest (Varalli Aff. T–4, T–5). That projection is unhelpful; it bears no relation either to the economic realities of this case or to the question whether creditors would be harmed by continued operations. The bulk of the liquidation value of the Penn Central estate as shown on the Day & Zimmerman appraisal consists of real estate, and inflation in land values may offset any operating losses and increase the realizable value of the estate.

Moreover, any forecast of prospective erosion through 1975 must take into account the 10 percent

rate increase, granted by the Interstate Commerce Commission on June 4, 1974, in *Ex Parte 305*. This rate increase should raise freight operating revenue by over $80 million during the last six months of 1974 alone (Varalli 120-day Tr. 12490–12491).

G. FUTURE EROSION THROUGH 1975 MAY BE WORSE IF THE RAILROAD IS LIQUIDATED

To gauge accurately any injury to the creditors by virtue of the continuation of rail operations pending the implementation of the final system plan, one must consider what the erosion would be if rail operations were in fact terminated and the liquidation process begun. The little evidence available suggests that greater erosion would result from liquidation than from continued operations.

In the ICC proceedings, the Penn Central Trustees proposed a cessation of rail operations to begin on October 31, 1973, to be followed by a nine-month holding period in which the Trustees would attempt to sell off portions of the railroad for continued rail use, and failing that, to be followed by a liquidation. A 13-month cash forecast on these conditions was prepared for the Trustees by Ernest Varalli and submitted to the Commission as Ex. 7 to Mr. Varalli's affidavit (Varalli ICC Ex. 16). That forecast shows, directly or by inference, that during that 13-month period real estate taxes, leased line rentals, and post-bankruptcy interest would continue to accrue; in the absence of payments on equipment loans, equipment might be repossessed and sold in foreclosure sales, with a possible loss of part of the debtor' equity; and employee severance pay and other claims would be referred to the reorganization court for settlement. While the amount of these items is not presently calculable, they are likely to be susbtantial.

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